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Ms. Donna R. Searcy
Secretary
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1919 M Street, N.W., Room 222
Washington, D.C. 20554

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APR 30 1992

Federal Communications Commission
Office of the Secretary

Re: CC Docket No. 92-13

Dear Ms. Searcy:

The reply comments we filed yesterday in the above-captioned proceeding contained several typographical errors that may have obscured the meaning of some sentences. Therefore, enclosed please find the original and five copies of the revised Reply Comments of the Custom Network Services Users Group. Please file-stamp the extra copy for our messenger.

Very truly yours,


Ellen G. Block

Attorney for the Custom Network
Services Users Group

cc: Chairman Alfred C. Sikes
Commissioner James H. Quello
Commissioner Sherrie P. Marshall
Commissioner Andrew C. Barrett
Commissioner Ervin S. Duggan
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APR 30 1992

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of the Secretary

In the Matter of)
) CC Docket No. 92-13
Tariff Filing Requirements for)
Interstate Common Carriers)

REPLY COMMENTS OF
THE CUSTOM NETWORK SERVICES USERS GROUP

The Custom Network Services Users Group ("CNS Users Group")¹ submits these reply comments pursuant to the Notice of Proposed Rulemaking ("NPRM") released by the Commission on January 28, 1992 in the above-captioned proceeding.

1 The Group's members are The Bank of America, NTSA, The Bank of California, N.A., Baxter Healthcare Corp., City National Bank, First Interstate Bank of California, Goldman Sachs & Co., Grumman Data Systems, MasterCard International Incorporated, Metropolitan Life Insurance Co., Morgan Stanley & Co., NationsBank Corporation, the New York Clearing House Association, PaineWebber Inc., Pearson, Inc., The Prudential Insurance Company of America, Public Service Enterprises, Inc., QVC Network, Inc., Sanwa Bank California, Securities Industry Association, Security Pacific Automation, Time-Warner, Inc., Union Bank, and Wells Fargo Bank. The New York Clearing House Association's members are The Bank of New York, Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Manufacturers Hanover Trust Company, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank, USA, European American Bank and Republic National Bank of New York.

INTRODUCTION

Other parties have defended the legality of the Commission's forbearance policy for non-dominant carriers in light of the Communications Act, recent amendments thereto, and relevant court decisions.² The CNS Users Group agrees with those analyses, and therefore limits these reply comments to two alternative regulatory structures that the Commission should consider adopting for the OCCs if it (incorrectly, in our view) feels compelled to revise its present policies.

If the Commission believes -- despite strong legal support -- that it must amend the forbearance policy that has served the marketplace so well for a dozen years, the CNS Users Group urges the Commission to fashion a regulatory regime that recognizes the highly competitive market for high-end business services. Any regime adopted should allow customers and carriers maximum flexibility, consistent with the Commission's regulatory obligations. Of the two approaches we favor, one involves acknowledging that non-dominant carriers may provide competitive services on a private carriage basis, and adopting non-intrusive rules to facilitate private carriage. The other foresees a very streamlined tariff regime, expressly intended to be the minimum necessary to comply with the Communications Act.

² See, e.g., Comments of the Ad Hoc Telecommunications Users Committee (Mar. 30, 1992); Comments of the International Communications Association (Mar. 30, 1992).

I. IF IT FEELS COMPELLED TO MODIFY
FOREBEARANCE, THE COMMISSION SHOULD
CONSIDER A BROAD AUTHORIZATION OF PRIVATE
CARRIAGE

Service providers that function as common carriers may also offer private carriage. The Commission has claimed "significant leeway" to permit interexchange carriers to offer some high-end interstate services on a private carriage basis,³ and the courts have affirmed the Commission's ability to authorize private carriage in such circumstances.⁴

The Commission took a step in this direction in Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880 (1991) ("IXC Order"), where it concluded "that the business services market is substantially competitive" and that "significant forces . . . are driving competition in this market segment." Id. at 5887. In light of this, the Commission decided to permit all interexchange carriers to offer competitive services pursuant to individually negotiated contracts. The Commission described contract carriage as a means of allowing single-customer contracts that "would enable users to purchase services that match their needs in specific ways," and would "facilitate planning by users and IXC's alike through the

3 See, e.g., Competition in the Interstate Interexchange Marketplace, NPRM, 5 FCC Rcd 2627, 2644-45 (1990) (and cases cited therein) ("IXC NPRM")

4 See, e.g., Wold Communications, Inc. v. FCC, 735 F.2d 1465, 1474-76 (D.C. Cir. 1984) (affirming Commission's authorization of the provision of transponder satellite service on a private carriage basis).

greater availability of long-term commitments and price protection."⁵

Contract carriage so described is strikingly similar to private carriage.⁶ "Private carriers" make individualized decisions regarding the terms and conditions of their service offerings, while "common carriers" indifferently hold themselves out to service the public.⁷ Private carriers generally contract with relatively stable classes of customers on a medium- or long-term basis, often for specialized services. Id. The competitive business services offered by the OCCs pursuant to contract carriage share these characteristics -- they are long-term, specifically tailored offerings to a finite number of large customers.⁸ By

5 IXC NPRM, 5 FCC Rcd at 2642.

6 The Commission previously considered a proposal to permit AT&T to offer certain business services on a private carriage basis. IXC Order, 6 FCC Rcd at 5897 n.150. Whatever the Commission's reasons for abandoning that proposal, there appear to be no legal or practical impediments to applying it to non-dominant carriers who have, after all, operated in a largely unregulated environment for a dozen years.

7 National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 643 (D.C. Cir. 1976), cert. denied, 425 U.S. 992 (1976) ("NARUC I").

8 See IXC NPRM, 5 FCC Rcd at 2645 (high-end customized service packages "may well, in some cases, be taking on the characteristics of private carriage"); Norlight Request for Declaratory Ruling, 2 FCC Rcd 132, 134-35 (1987) (sale of tailored fiber optic service to a limited and stable group of large business entities and institutions selected on an individualized basis for one to ten year contract terms is private carriage). These reply comments address only the high-end market for competitive services, in particular custom network service agreements involving multi-year agreements and commitments of (at least) millions of dollars. Other market segments may present different issues and concerns.

exercising its authority to allow the OCCs to provide network services on a private carriage basis, the Commission will further foster competition in this market.⁹

To users, the principal disadvantage of private carriage is the absence of Section 201-203 protections against unjust and unreasonable practices, notably discrimination and refusals to serve. Countering this concern is the fact that services provided by non-dominant carriers to sophisticated customers in highly competitive markets are not likely to be susceptible to discrimination or other unreasonable practices:

[N]on-dominant common carriers . . . facing strong competition in the marketplace . . . could be treated by forbearance because the Section 208 complaint process, market forces and the Commission's power to reimpose tariff filing and facilities authorization requirements were sufficient to check these carriers' ability to charge unjust, unreasonable or discriminatory rates.¹⁰

Because the market for services provided on a contract carriage basis is highly competitive, private carriage of the same services should not lead to widespread practices of

9 See IXC NPRM, 5 FCC Rcd at 2644 (private carriage is "consistent with the thriving competition that prevails in the high-end marketplace").

10 Policy and Rules Concerning Rates for Competitive Common Carrier Services, Sixth Report and Order, 99 F.C.C.2d 1020, 1021 (1985). See also Detariffing of Billing and Collection Services, Report and Order, 102 F.C.C. 2d 1150, 1170 (1986) (competition allows market forces to respond to excessive rates or unreasonable practices); Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198, 207 (D.C. Cir. 1982) (same) ("CCIA"), cert. denied, 461 U.S. 938 (1983).

the type prohibited by Title II. As it did in Competitive Common Carrier, however, the Commission can (and should) retain the ability to correct any carrier abuses that occur under a private carriage system.¹¹

Services provided through private carriage differ from services in which regulation has been forborne because Title II is facially inapplicable to the former. But the Commission has in the past retained the authority to reregulate if necessary,¹² and can do the same here by use of its ancillary jurisdiction under Title I of the Communications Act, 47 U.S.C. §§ 152(a) and 154(i). Section 152(a) gives the Commission jurisdiction over "all persons engaged within the United States in [interstate or foreign] communication," and Section 154(i) empowers the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Chapter, as may be necessary in the execution of its functions." Courts reviewing the legislative history of Title I have found that Congress conferred "broad authority," a "comprehensive mandate," and "not niggardly

11 See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 F.C.C.2d 1, 18 (1980) (decision to forbear tariff filing "[did] not relieve non-dominant carriers from [the requirement of] complying with the provisions of Sections 201-205 of the Act").

12 See, e.g., AT&T 900 Dial-It Services and Third Party Billing and Collection Services, Memorandum Opinion and Order, 4 FCC Rcd 3429, 3433 (1989); Wold, 735 F.2d at 1474-75.

but expansive powers" on the Commission.¹³ The Commission has acknowledged and regularly exercised its ancillary jurisdiction.¹⁴ The Commission could use its Title I ancillary jurisdiction to remedy any problems involving unjust or unreasonable carrier rates or practices, unjust or unreasonable discrimination, unlawful restrictions on resale or shared use, inadequate service quality, and other issues adversely impacting customers.¹⁵ Oversight could be

13 United States v. Southwestern Cable Co., 392 U.S. 157, 171-78 (1968) (concluding that Title I confers independent regulatory authority "reasonably ancillary to the effective performance of the Commission's various [regulatory] responsibilities") (citations omitted). See also CCIA, 693 F.2d at 212-14 (D.C. Cir. 1982) (it is "settled beyond peradventure that the Commission may assert jurisdiction under [Title I] over activities that are not within the reach of Title II"). See generally Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282, 284 (D.C. Cir. 1966) ("[I]n a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective").

14 See, e.g., Norlight, 2 FCC Rcd at 135-36 (Commission retains Title I jurisdiction over private carriage fiber optic service); Detariffing of Billing and Collection Services, Report and Order, 102 F.C.C.2d at 1169 (1986) (billing and collection is not common carrier communications service subject to Title II; although Commission retains discretion to regulate under Title I, it declines to do so because service is competitive); AT&T 900 Dial-It Services and Third Party Billing and Collection Services, Memorandum Opinion and Order, 4 FCC Rcd at 3433 (1989) (same).

15 See, e.g., Detariffing of Billing and Collection Services, Report and Order, 102 F.C.C.2d at 1174 (1986) (detariffed recording service but used Title I jurisdiction to require provision of service at reasonable rates upon reasonable request); CCIA, 693 F.2d at 208, 211-12 (Commission exercised ancillary jurisdiction under Title I to require unbundling of CPE and offering of CPE through separate subsidiary).

accomplished through a complaint-type procedure similar to that established in Section 208 of the Act, or on the Commission's own motion as set forth in Section 403.¹⁶

II. IF THE COMMISSION DETERMINES THAT TARIFF
FILINGS ARE REQUIRED, IT SHOULD IMPLEMENT
A VERY STREAMLINED REGIME

If the Commission concludes that even non-dominant carriers must tariff all of their services, the CNS Users Group urges it to adopt a flexible, minimal filing regime that reflects the competitive nature of the market. Specifically, the Commission should allow OCC tariffs to take effect on one day's notice, require no cost support, allow tariffs to specify banded rates, and presume charges within rate bands to be lawful. In a typical tariff with banded rates, the tariff specifies a maximum and minimum rate for each service category, and a rate table attached to the end of the tariff specifies the current effective rate for each service category.¹⁷ A rate change is effected by amending the rate table.¹⁸ Such a regime

16 See Detariffing of Billing and Collection Services, NPRM, 100 F.C.C.2d 607, 613 (1985) (proposing that the Section 208 complaint process be used for residual regulation even after removal of Title II authority).

17 In New York, where all carriers are required to file tariffs, the Public Service Commission uses a regime of precisely this sort for nondominant carriers. See MCI Telecommunications Corp. v. Pub. Serv. Comm'n of N.Y., 572 N.Y.S.2d 469 (N.Y. App. Div. 3d Dept. 1991) (construing state statute to require tariff filings plainly showing all rates and charges).


18 Many states use banded rates (or ceiling prices or floor prices only) for OCCs and other providers of competitive (Footnote 18 Continued)

would honor the literal requirement of Section 203 while permitting carriers to respond quickly and flexibly to customer needs.

CONCLUSION

If the Commission decides to abandon its forbearance policy, the CNS Users Group urges the Commission to consider the competitive nature of the high-end customized service market and the need for customer and carrier flexibility to reap the full benefits of competition. The CNS Users Group thus requests that the Commission consider the authorization of private carriage for these services or, if tariff filing requirements are imposed, a streamlined tariff regime.

Respectfully submitted,



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DATED: April 29, 1992

(Footnote 18 Continued)
services. See State Telephone Regulation Report at 3 (Aug. 22, 1991); State Telephone Regulation Report at 3 (Sept. 5, 1991) (both attached as Exhibit A).

INTRASTATE LONG DISTANCE COMPETITION (East) **Intra-LATA** **Pricing Flexibility** **Competition?** **For Long Distance Providers**

State	Long Distance Carriers	Resellers	AT&T	OCC	Reseller	Telco
Alabama	Partial(1)	Yes	F	A,P	A,P	A,R
Connecticut*	Partial(2)	Yes(2)	B	B	B	B,R
Delaware*	Yes	Yes	P	P	P	P
Florida	Partial(3)	Yes	A	D	D	A,R
Georgia	Partial(4)	Yes	B	B	D	A,R
Illinois	Yes	Yes	F	F	F	A,R
Indiana	Yes	Yes	B,R	D	D	A,R
Kentucky	Yes	Yes	A,R	D	D	A,R
Louisiana	Partial(5)	Yes	C,R	D	D	A,R
Maine*	Yes	Yes(6)	C	C	D	A,R
Maryland	Yes	Yes	D	D	D	D,R
Massachusetts	Yes	Yes	A,R,P	D(7)	D(7)	A,R
Michigan	Yes	Yes	B,R	D	D	B,R
Mississippi	Partial(8)	Yes	B	B	D	A,R
New Hampshire*	Partial(9)	Yes	D	D	D	A,R,P
New Jersey	No	Yes	B,R	B	D,P	A,R
New York	Yes	Yes	B,R(10)	B(10)	B(10)	A,R
North Carolina	No	Yes	C,R	D	D	A,R
Ohio	Yes	Yes	C	C	C	C,R
Pennsylvania	Yes	Yes	A(11)	A(11)	C	A,R
Rhode Island*	Pending	Pending	P	P	P	P
South Carolina	Partial(12)	Yes	C	C	C	C(12)
Tennessee	Yes	Yes	C	D	D	B,R
Vermont*	Yes	Yes	D	D	D	C(13)
Virginia	Pending	Yes	D	D	D	A,R
West Virginia	Yes	Yes	S	S	S	S(14)
Wisconsin	Partial(15)	Yes	C	D	D	B,R

A — No pricing flexibility; tariff change requires prior state approval.

P — Pending proceeding may result in changes to regulation.

B — Banded rates; carrier free to move prices between ceiling and floor levels.

R — Rate of return prescribed by state regulators.

C — Ceiling price only; carrier can set rates at any point below rate cap.

S — Streamlined staff review of all tariff and price changes.

D — Full pricing flexibility; carrier may reprice to match market.

OCC — Other common carrier; facilities-based carrier other than AT&T

F — Floor prices only; carrier can set rates at any point above cost floor.

* Single-LATA state

1 Alabama limits long distance carriers to intra-LATA high-volume WATS services.

2 Connecticut limits long distance carriers to private lines and specialty business services. Resellers must buy underlying facilities only from SNET; no intrastate long distance reseller currently operates.

3 Florida allows long distance competition between its unique "mini-LATAs"; full LATA-wide IXC competition begins in 1992.

4 Georgia limits long distance carriers to intra-LATA virtual networks and high-volume WATS services.

5 Louisiana telcos can compete within LATAs. Long distance carriers limited to high-volume WATS services. Decision due soon on whether to broaden scope of intra-LATA competition.

6 No intrastate long distance reseller currently operates. Resellers contend PUC access policies make intrastate resale uneconomic.

7 Intrastate operator services in Massachusetts are subject to a rate cap; other services have full pricing flexibility.

8 Mississippi limits intra-LATA IXC competition to high-volume WATS services.

9 Long distance carriers in New Hampshire sought authority only for WATS, 800 service and virtual network services.

10 AT&T New York MTS rates frozen until 1992. Carriers define own rate bands in an initial tariff. AOS firms can't exceed AT&T rate.

11 In Pennsylvania, rate changes below threshold level are decided by PUC within 30 days; denial is rare.

12 Only one intra-LATA carrier, Telecom USA, allowed because it operated before creation of LATAs. Ceiling applies only to Southern Bell.

13 Telco price ceiling in Vermont does not apply to long distance services offered after 1988.

14 West Virginia telco streamlining applies only to C&P Telephone.

15 Wisconsin limits long distance carriers to intra-LATA virtual networks, high-volume WATS services and 800 services.

INTRASTATE LONG DISTANCE COMPETITION (West)Intra-LATA
Competition?Pricing Flexibility
For Long Distance Providers

State	Long Distance		AT&T	OCC	Reseller	Telco
	Carriers	Resellers				
Alaska*	Partial(1)	Yes	n/a	C	D	P
Arizona	No	Yes	B,R	B	D	B,R
Arkansas	Yes(2)	Yes	S,R	S	S	A,R
California	Partial(3)	Partial(3)	B	D	D	C
Colorado	Yes	Yes	B	D	D	A,R
Hawaii*	Partial(4)	No	n/a	n/a	n/a	A,R
Idaho	Yes	Yes	D	D	D	D
Iowa	Yes	Yes	D	D	D	A,R
Kansas	No	No	B	C	C	A,R
Minnesota	Yes	Yes	D(5)	D(5)	D(5)	A,R
Missouri	Yes	Yes	F	D	D	A,R,P
Montana	Yes	Yes	C,R,P	D	D	A,R
New Mexico*	Yes	Yes	A,R,P	B	B	B
North Dakota	Yes	Yes	F	D	D	F
Nebraska	Yes	Yes	D	D	D	D
Nevada	Pending	Pending	B	B	D	A,R
Oklahoma	Partial(6)	Yes	S	S	D,P	A,R
Oregon	Yes	Yes	D	D	D	A,R
South Dakota*	Yes	Yes	S	S	S	S
Texas	Yes	Yes	B,R	D	D	A,R
Utah*	Yes	Yes	A,R	D	D	A,R
Washington	Yes	Yes	D	D	D	A,R
Wyoming	No	Yes	n/a	n/a	A	A,R

A — No pricing flexibility; tariff change requires prior commission approval.

P — Pending proceeding may result in changes to regulation.

B — Banded rates; carrier free to move prices between ceiling and floor levels.

R — Rate of return prescribed by state regulators.

C — Ceiling price only; carrier can set rates at any point below rate cap.

S — Streamlined staff review of all tariff and price changes.

D — Full pricing flexibility; carrier may reprice to match market.

OCC — Other common carrier; facilities-based carrier other

F — Floor prices only; carrier can set rates at any point above cost floor.

than AT&T * Single-LATA state

1. Alaska limits long distance carriers to high-density routes connecting the 37 largest cities and towns.

2. Arkansas long distance carriers can provide intra-LATA service to any customer having an established inter-LATA or interstate account for the service.

3. California limits intra-LATA long distance and reseller competition to high-speed (T-1 and above) digital private line services, pending completion of PUC intra-LATA competition docket.

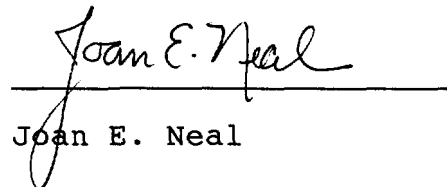
4. Hawaii has permitted competition in inter-island private line data services, but no competitor presently operates. GTE Hawaiian Telephone tariffs prohibit all resale.

5. Minnesota can order rollbacks and refunds of any long distance carrier or reseller rate change for 10 months after the effective date.

6. Oklahoma limits long distance carriers to "incidental" provision of low-end virtual 800 services and high-volume 800 services. Telcos compensated for lost intra-LATA revenue.

CERTIFICATE OF SERVICE

I, Joan E. Neal, hereby affirm that on April 29, 1992, I served the foregoing Reply Comments of the Custom Network Services Users Group, by first class mail, postage prepaid, on all parties on the attached list.


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